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Proc. II

Roger Ayer

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

**FILE: B-107908**

**DATE: December 27, 1976**

**MATTER OF: Lebo Trucking and Merchants Wholesale  
Distributing Co.**

**DIGEST:**

Where protest raises same issue as is now pending in appellate court; protester has requested injunctive relief pending appellate court's determination rather than GAO's determination; and neither appellate court deciding substantive issue nor District Court deciding injunctive issue has indicated any interest in our views, protest is dismissed.

Lebo Trucking and Merchants Wholesale Distributing Co. (Lebo/Merchants) protests the award by the Department of Defense Military Traffic Management Command (MTMC) of any contract pursuant to MTMC's August 19, 1976, invitation to submit rates for movement of perishable subsistence, prior to final determinations of legal issues by the Ninth Circuit Court of Appeals in pending Civil Action No. 76-3092. Lebo/Merchants supplements this protest with several additional protests, namely: (1) protest is made to any disqualification of Lebo/Merchants for failure to hold ICC operating authority; (2) protest is made to any award of contract pursuant to the invitation to any ICC-certificated carrier without prior determination by the Department of Defense that such ICC-certificated carrier intends to, and will in fact perform, and has in the past performed, such Government subsistence movement in equipment under the exclusive and direct control and operation of the ICC-certificated carrier, and not pursuant to a Division of Revenue, Subhauler agreement with non-bidding carriers; and (3) protest is made to any award of contract pursuant to the invitation to any ICC-certificated carrier without prior determination by the Department of Defense of the responsibility of all subhaulers/subcontractors intended to be utilized by such ICC-certificated carrier in servicing its contract obligations.

First we note that the thrust of this protest is such that it would have the General Accounting Office assist the protesters in staying MTMC's hand until the Ninth Circuit Court of Appeals can rule on the legal issues of (1) whether operating authority from the ICC is required in order for the protesters to be responsible bidders and, if such authority is required, (2) whether the ICC abused its authority in refusing such operating authority to the protesters.

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However, the protesters have at the same time sought, and we understand obtained, from the United States District Court for the Central District of California an injunction which bars the Department of Defense from awarding a contract until such time as the Ninth Circuit Court of Appeals can render a decision. Further, we believe the material issue in this case to be whether an agency can deem a bidder for such a contract to be nonresponsible for failure to hold ICC operating authority. Our review of the pleadings leads us to the belief that this material issue is now pending before the Ninth Circuit Court of Appeals. The pleadings further indicate that on November 29, 1978, the protesters, in the course of seeking an injunction against the Department of Defense, notified the United States District Court of their protest to this Office. However, there is no indication in the record before us that either the United States District Court or the Ninth Circuit Court of Appeals has requested, expects or is otherwise interested in our decision. See Section 20.10, Bid Protest Procedures, 4 C.F.R. § 20.10 (1978). Since the injunctive relief which the protesters sought was in anticipation of the Ninth Circuit's decision and was not requested pending any determination by this Office, and since neither court has otherwise indicated any interest in our views, we must refuse to decide this protest.

Accordingly, this protest is dismissed.

*Milton Fowler*  
for Paul G. Dembling  
General Counsel